UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

MC Management, Inc.,	)	C/A No.: 1:19-cv-646
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Ken Cuccinelli, Acting, Director, United States Citizenship and Immigration Services,	)	
	)	
Defendant.	)	
	)	

COMPLAINT

Plaintiff MC Management, Inc. ("MCM") sought to hire an IT/IS project manager. It always requires such employees to have a bachelor's degree in an academic field that would give the employee the necessary skills to be an IT/IS project manager. MCM is not going to hire someone who lacks the skills to do the proffered job, and it always requires a college degree for the proffered job. Even in a tight job market, MCM identified such an employee, provided him a job offer, and sought a visa under 8 U.S.C. § 1101(a)(15)(h)(1)(B) ("H1B Visa") for such employee. But Defendant ("the Agency") denied MCM's request for a visa, finding that MCM's proffered position did not qualify for an H1B Visa because (1) the position did not require one, specific college degree; (2) only "some, but not all" Information Technology Project Managers require bachelor's degrees; and (3) MCM's mandatory college degree requirement was insufficient to prove the position required a college degree. The Agency's rationale is desperate. For the reasons below, this Court should set aside the Agency's denial, remand the case to the Agency with instructions to approve the visa, and award MCM attorneys' fees and costs.

PARTIES

1. Plaintiff MC Management, Inc. is incorporated under the laws of New Jersey with its principal place of business in New Jersey. But it does significant amounts of business in the Middle District of North Carolina, including a call center and warehouse employing 95 employees in Alamance County, North Carolina. Plaintiff also owns and operates three retail locations in North Carolina that operate under the name of "JR Cigar."

2. Defendant Ken Cuccinelli is the Acting Director of United States Citizenship and Immigration Services ("USCIS"). He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H).

VENUE AND JURISDICTION

3. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

4. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA").

5. Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

6. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because MCM and USCIS do business in the Middle District of North Carolina. Specifically, Defendant does business in Durham County at the Raleigh Durham Field Office.

8. No statute or regulation requires an administrative appeal in this case. Thus, Plaintiff has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

9. USCIS's denial of Plaintiff's Form I129, Petition for Nonimmigrant Worker is a final agency action. 5 U.S.C. § 704.

LEGAL FRAMEWORK

H1B Visa Program

10. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

11. Specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

12. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa").

13. The relevant regulation identifies the following as exemplar backgrounds for specialty occupations: "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." 8 C.F.R. § 214.2(h)(2)(ii).

14. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

15. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

16. The employer then signs the approved Labor Condition Application and agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the Labor Condition Application is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

17. After receiving an approved Labor Condition Application and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

18. USCIS's then reviews the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

H1B Eligibility Criteria

19. USCIS is charged with determining only whether a proffered position is a "specialty occupation."

20. Congress defined "specialty occupation" as a position that requires a certain level of education or experience:

> (1) . . . the term "specialty occupation" means an occupation that requires—
>
> > (A) theoretical and practical application of a body of highly specialized knowledge, and
> >
> > (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> > (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

21. USCIS has further interpreted these requirements in its regulations:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

22. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

23. To determine whether a position is indeed a specialty occupation, USCIS often refers to the United States Department of Labor's Occupation Outlook Handbook ("OOH").

24. The Department of Labor regularly updates and supplements the OOH with ongoing surveys of each occupation's worker population and occupation experts. *See* https://www.onetonline.org/help/onet/ (Last accessed April 16, 2019). The Department of Labor

considers the O*NET program to be "the nation's primary source of occupational information." *Id*.

25. Upon approval of the H1B Visa application, the employee may work for up to three years for the petitioning employer in the particular specialty occupation. 8 U.S.C. § 1184(g).

26. In addition to this statute and regulation, in the last three years, USCIS has created various substantive rules through sub-regulatory guidance with dubious legal authority.

One-Degree Rule

27. USCIS has created a One-Degree Rule.

28. Under the One-Degree Rule, USCIS refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the proffered position does not require one specific degree.

29. In other words, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it requires one *specific* degree.

30. Various courts have identified this rule and rejected it:

> [USCIS's] implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.

31. *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

32. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

33. The One-Degree Rule is *ultra vires* and arbitrary and capricious. It is further entitled to no deference.

Most, But Not All Rule

34. Similarly, USCIS has created a Most, But Not All Rule.

35. USCIS considers the OOH authoritative and dispositive.

36. The OOH separates occupations into five separate job zones. The job zones correspond with the overall experience, job training, and education required for entry into a particular occupation. *See* Job Zone Procedures (*available at* https://www.onetcenter.org/dl_files/JobZoneProcedure.pdf (last visited April 16, 2019).

37. Relevant to specialty occupations, the OOH states that the education necessary to enter into an occupation in Job Zone Four as follows: "Most of these occupations require a four-year bachelor's degree, but some do not." *Id.* at 12.

38. The particular OOH entries on the O*Net then identify the percentages of employees in that field that have a four-year degree (and higher) versus those that do not.

39. USCIS, rather than considering the percentage of employers that require a bachelor's degree or more, seizes on the "some do not" language associated with all Job Zone Four positions and deems it binding. USCIS reasons that, because some positions do not require college degrees or more, the proffered Job Zone Four position cannot be a specialty occupation.

40. Under the Most, But Not All Rule, USCIS refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the OOH reports that most but not all positions require a bachelor's degree or higher in a specific occupation.

41. Thus, under this rule, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it is in Job Zone Five.

42. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

43. The Most, But Not All Rule is *ultra vires* and it is arbitrary and capricious.

Reopen and Request Additional Evidence Dilatory Strategy

44. In an effort to avoid critical judicial opinions, the Agency engages in a dilatory strategy of reopening the denial and issuing a duplicative requests for evidence when aggrieved companies sue to challenge H1B Visa denials.

45. Such tactic is solely for the purpose of delaying litigation because the Agency lacks authority to reopen on its own motion and issue a request for evidence.

46. But the Agency's own regulations disallow it from reopening a case on its own motion only to issue a request for evidence. *See* 8 C.F.R. § 103.5.

47. The Agency cites to § 103.5(a)(5) for authorization for this strategy. That sections states:

> (5) Motion by Service officer—
>
> (i) Service motion with decision favorable to affected party. When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision in order to make a new decision favorable to the affected party, the Service officer shall combine the motion and the favorable decision in one action.
>
> (ii) Service motion with decision that may be unfavorable to affected party. When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause

> shown. If the affected party does not wish to submit a brief, the affected party may waive the 30–day period.

8 C.F.R. § 103.5(a)(5).

48. USCIS interprets this regulation to meant that potentially adverse re-openings should be done through a notice of intent to deny. USCIS's Adjudicator's Field Manual notes as follows:

> (c) USCIS Motions.
>
> If you determine that a petition should not have been approved but there are no specifically applicable grounds for revocation in the regulations, or that a petition should not have been denied, the petition may be reopened on USCIS motion and a new decision issued. [*See* 8 CFR 103.5(a)(5).] If the motion is adverse to the petitioner or applicant, a "notice of intent" should be used; if the new decision is favorable, the decision can be issued without any prior notice. A new appeal period commences with the issuance of a new adverse decision.

Adjudicator's Field Manual 10.17(c).

49. The Agency lacks authority to reopen a denial for the sole purpose of requesting additional information. They can request a brief or issue a notice of intent to deny.

50. Nevertheless, the Agency will attempt to reopen and request additional evidence to delay litigation, and it has done so in this Court and others. *See InspectionXpert v. Cissna*, No. 19-cv-65-TDS-LPA (M.D.N.C.) (reopening, issuing a second, identical request for evidence, and re-denying); *Electrical Equipment Co. v. Cissna*, No. 19-cv-74-LCB-JEP (M.D.N.C.) (reopening, issuing second, identical request for evidence, and denying in part); *See also Conceptual Minds v. Cissna*, 19-cv-422 (D.D.C.): (reopening immediately before its initial response is due and issuing a nearly identical, second request for evidence); *Chelsoft v. Cissna*, 19-cv-546 (D.D.C.)(same); *KLC Consulting v. Cissna*, 19-cv-557 (D.D.C.)(same); *Zaps Technocrats v. Cissna*, 19-cv-874 (D.D.C.) (same); *RSM Technologies v. Cissna*, 19-cv-872 (D.D.C.)(same); *Team International v. Cissna*, 19-cv-971 (D.D.C.) (same).

51. Upon information and belief, the Agency will attempt to reopen and issue a second, duplicative request for evidence in an effort to delay this case because, as described below, the Agency's denial is arbitrary and capricious.

FACTS

52. MCM is in tobacco manufacturing and sales. MCM has retail locations in various places in the United States and a sizeable web presence, *see* www.jrcigars.com.

53. Specifically, MCM has three retail stores in North Carolina, operating under the name "JR Cigar," and it has a call center and warehouse. The call center and warehouse alone employ approximately 95 people in Alamance County, North Carolina.

54. MCM has lately been improving and migrating its online business.

55. To service its online business, MCM sought to hire an IT/IS Project Manager.

56. The IT/IS Project Manager would be charged with developing and managing technology projects including their cost, time and scope using various web technologies and new platforms with various domains experience.

57. The IT/IS Project Manager would be responsible for providing direction, coordination, implementation, execution, control and completion of each project, while remaining aligned with strategy, commitments and goals of the organization.

58. The specific duties of the position will include:

- Create & manage project plans. Define project schedules, allocate resources and monitor progress;
- Align project objectives with company goals, and make sure project team is clear on objectives;
- Deliver and install technology solutions. Help project team with the design and development tasks throughout the entire SDLC;
- Support, direct team and lead quality assurance. Monitor and report on project progress;
- Lead process of issue identification and resolution;
- Manage risk tracking process and manage all documentation;

- Monitor and manage scope. Implement and manage change when necessary to meet project outputs;
- Work on multiple web and infrastructure projects simultaneously;
- Foster partnership with customers/stakeholders/sponsors. Present to stakeholders reports on progress as well as problems and solutions; and
- Responsible for managing our new warehouse management system and coordinating with vendors from initiation to rollout.

59. MCM requires that all IT/IS Project Manager positions possess at least a Bachelor's degree in a related field, noting that in some instances, additional requirements such as an advanced degree and/or prior work experience are required due to the sophistication of a specific project or job duties.

60. Based on these job requirements, MCM sought an H1B Visa on behalf of the potential employee.

61. As part of its labor condition application, MCM characterized the position as a Wage Level II position, not an entry level position.

62. It further identified the position in the labor condition application as falling within SOC Code 15-1199.09 - Information Technology Project Managers.

63. The O*Net Online describes this SOC Code as a Job Zone Four, meaning that "Most of these occupations require a four-year bachelor's degree, but some do not."

64. O*Net reports that the education level required for occupations that fall within this SOC Code require at least a bachelor's degree 100% of the time. (available at https://www.onetonline.org/link/summary/15-1199.09 (last visited June 26, 2019)).

65. MCM sought a labor condition application for the position, and the Department of Labor certified the Labor Condition Application.

66. MCM then attached this certified labor condition application to its Form I-129, Petition for a Non-Immigrant Worker seeking an H1B Visa.

67. It entered its petition in the lottery and it was selected in the FY 2019 lottery.

68. The Agency then requested additional evidence.

69. The request for evidence sought additional evidence on every regulatory requirement, but it did not identify any specific evidence.

70. MCM responded timely and provided additional evidence.

71. The Agency then denied, finding that MCM failed to satisfy any of the four regulatory requirements for demonstrating the position required a college degree.

72. On June 21, 2019, the beneficiary of this H1B Visa petition ran out of work authorization, which was associated with his student status.

73. MCM does not have anyone who can fill his position. The H1B Visa beneficiary has intimate knowledge of a significant, long-term migration project and its impact on MCM's business.

74. MCM will lose significant revenue without someone to fill the IT/IS Project Manager position without the beneficiary, and it will be irreparably harmed.

75. This case followed.

FIRST CAUSE OF ACTION
(APA - the Denial is Arbitrary and Capricious)

76. Plaintiff re-alleges all facts herein.

77. USCIS's denial is final agency actions that aggrieved Plaintiff. 5 U.S.C. § 704.

78. USCIS's denial is based, in part, on its One Degree Rule and its Most, But Not All Rule.

79. USCIS's denial violates the APA because its bases—its One Degree Rule and its Most, But Not All Rule —are *ultra vires* and, therefore, the Denial is in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 706(2)(C).

80. USCIS's denial violates the APA because its basis—its One Degree Rule and its Most, But Not All Rule —constitute legislative rules that did not go through notice and comment rulemaking and, therefore, the denials are without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

81. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is arbitrary and capricious as it contradicts § 1182(n)(2)(C)(vii) and DOL's approval of the

82. USCIS's denial violates the APA because its basis—the One Degree Rule—is *ultra vires* and arbitrary and capricious. *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

83. USCIS's denial violates the APA because its basis—the Most But Not All Rule—is *ultra vires* and arbitrary and capricious.

84. USCIS's determination that the Plaintiff's proffered position is not a "specialty occupation" is arbitrary and capricious.

85. Similarly, to the extent these rules are lawful, as applied, the denial is arbitrary and capricious. A final agency action is arbitrary and capricious where:

> USCIS has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before USCIS, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

86. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the One Degree Rule, which is *ultra vires*, unlawful, and arbitrary and capricious.

87. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the Most, But Not All Rule, which is *ultra vires*, unlawful, and arbitrary capricious.

88. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it lacks reasoned decisionmaking as vast swaths of the analysis are indecipherable.

89. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it considered factors Congress did not intend USCIS to consider.

90. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it entirely failed to consider an important aspect of the problem.

91. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because its rationale runs counter to the evidence in the record.

92. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is so implausible it cannot be the result of Agency expertise.

93. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

94. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, declare Plaintiff's proffered position as a specialty occupation, instruct it to re-

adjudicate the H1B Visa application without applying its One Degree Rule or its Most, But Not All Rule.

PRAYER FOR RELIEF

Plaintiff, therefore, prays that this Court enter the following relief:

1. Take jurisdiction over this case;

2. Declare USCIS's One Degree Rule unlawful or arbitrary and capricious;

3. Declare USCIS's Most, But Not All Rule unlawful or arbitrary and capricious;

4. Declare USCIS's Specific, Non Speculative Work Rule unlawful or arbitrary and capricious;

5. Declare USCIS's denial in this case violative of the Administrative Procedure Act;

6. Remand this case to USCIS with instructions to re-adjudicate the case in compliance with the above declarations within 15 calendar days;

7. Grant all relief that is necessary and proper; and

8. Award attorneys' fees and costs under the Equal Access to Justice Act.

June 28, 2019

Respectfully submitted,

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